

1 Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THE INSTITUTE OF CETACEAN  
RESEARCH, a Japanese research  
foundation; KYODO SENPAKU  
KAISHA, LTD., a Japanese corporation;  
TOMOYUKI OGAWA, an individual; and  
TOSHIYUKI MIURA, an individual,

### **Plaintiffs,**

V.

SEA SHEPHERD CONSERVATION SOCIETY, an Oregon nonprofit corporation, and PAUL WATSON, an individual.

### Defendants.

No. C11-2043 RAJ

**PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65(a)

**NOTE ON MOTION CALENDAR:  
January 6, 2012**

## **ORAL ARGUMENT REQUESTED**

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
(C11-2043 RAJ)**

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## I. MOTION

2 Plaintiffs The Institute of Cetacean Research ("ICR"), Kyodo Senpaku Kaisha, Ltd.  
3 ("Kyodo Senpaku"), Tomoyuki Ogawa ("Captain Ogawa"), and Toshiyuki Miura ("Captain  
4 Miura") bring this action against defendants Sea Shepherd Conservation Society ("SSCS") and its  
5 president and founder, Paul Watson ("Watson") to enjoin them from engaging in physical attacks  
6 on plaintiffs' vessels in the Southern Ocean (the ocean encircling Antarctica). Over the past few  
7 years, defendants have engaged in repeated, relentless violent attacks against plaintiffs in the  
8 Southern Ocean, ranging from ramming vessels, attempting to disable plaintiffs' ships by dragging  
9 fouling ropes in their path, firing acid-filled glass projectiles at plaintiffs' vessels and their crew  
10 and launching incendiary devices against the vessels and crew, exposing them to risk of fire and  
11 explosion. This conduct endangers the safety of the vessels and the Masters, crew, and researchers  
12 on board and is in violation of international and domestic law, let alone any rational standard of  
13 human conduct. Defendants have declared their intent to launch their strongest fleet ever for their  
14 "Operation Divine Wind" (the English translation of "kamikaze") to "stop" plaintiffs, even at the  
15 risk of death. It is defendants who should be stopped.

16 Defendants take the position their conduct is justified because they believe  
17 plaintiffs, their crew, and the researchers are engaged in illegal whaling. Plaintiffs do not believe  
18 their activities are illegal, but that is not the issue before this Court. Plaintiffs are entitled to be  
19 free from attack by what are essentially self-proclaimed pirates with a base in the state of  
20 Washington.

21 Pursuant to Fed. R. Civ. P. 65, plaintiffs move the Court to grant preliminary  
22 injunctive relief enjoining defendants and each of them and their respective officers, agents,  
23 members, servants, employees, attorneys, and other persons who are in active concert or  
24 participation with any of them from:

(1) physically attacking any vessel engaged by plaintiffs in the Southern Ocean;

1                             (2) physically attacking any crew member or person on any vessel engaged by  
 2 plaintiffs in the Southern Ocean; and

3                             (3) navigating any vessel or other instrumentality in a manner that is likely to  
 4 endanger the safe navigation of plaintiffs' vessels in the Southern Ocean.<sup>1</sup>

5                             This motion is based on the record and files herein and the declarations filed  
 6 herewith of Kyodo Senpaku managing director Makoto Ito ("Ito Decl."), Captain Miura  
 7 ("Cpt. Miura Decl."), Captain Ogawa ("Cpt. Ogawa Decl.") and John F. Neupert ("Neupert  
 8 Decl."). Plaintiffs, respectfully, reserve the right to file supplemental support for this motion at  
 9 or before the hearing on the motion.

## 10                             II. STATEMENT OF FACTS

### 11                             A. Plaintiffs' Activities.

12                             As set forth in the complaint, Dkt. No. 1, verified by Kyodo Senpaku (Ito Decl.  
 13 ¶ 4), ICR engages in scientific research of whales and has done so for years. This activity is  
 14 authorized by Special Permits issued by Japan under the International Convention for the  
 15 Regulation of Whaling, *signed at Washington Dec. 2, 1946*, 62 Stat. 1716, 161 U.N.T.S. 72,  
 16 4 Bevans 248 (1968) (ratified by United States on July 18, 1947, and entered into force Nov. 10,  
 17 1948) (hereinafter "Whaling Convention"). (*See* Complaint, Dkt. No. 1, Ex. 1.)

18                             Japan and the United States are parties to the Whaling Convention, as are many  
 19 other countries. The Whaling Convention allows member countries to grant its nationals a  
 20 "Special Permit" that authorizes "that national to kill, take and treat whales for purposes of  
 21 scientific research subject to such restrictions as to number and subject to such other conditions  
 22 as the Contracting Government thinks fit . . ." Whaling Convention, art. VIII, § 1. Takings  
 23 authorized by the Special Permit are exempt from any of the Whaling Convention's prohibitions  
 24

25                             <sup>1</sup> Plaintiffs intend to present evidence at or before the hearing on the motion to support  
 26 establishment of a specific and defined safety perimeter around plaintiffs' vessels to ensure safe  
 navigation.

1 on the taking of whales. *Id.* Japan issued ICR and Kyodo Senpaku Special Permits to conduct  
 2 research activities in the Southern Ocean for the upcoming season (December 2011-March  
 3 2012). (*See* Complaint, Dkt. No. 1, Ex. 1.) These activities will occur on the high seas, i.e.,  
 4 waters outside the territorial jurisdiction of any nation.

5 Kyodo Senpaku owns the vessels NISSHIN MARU, YUSHIN MARU, YUSHIN  
 6 MARU NO. 2, and YUSHIN MARU NO. 3 that have been chartered by ICR to carry out the  
 7 activities authorized by the Special Permits this season. (Cpt. Ogawa Decl. ¶ 4; Cpt. Miura Decl.  
 8 ¶ 4.) The four vessels have a combined crew of 147 in addition to whale researchers and  
 9 government inspectors on board the vessels. (Complaint, Dkt. No. 1, ¶ 12.) Captain Ogawa, as  
 10 Master of the NISSHIN MARU, and Captain Miura, as Master of the YUSHIN MARU NO. 2,  
 11 are responsible for the safety of their crew and vessels while at sea. (Cpt. Ogawa Decl. ¶ 5;  
 12 Cpt. Miura Decl. ¶ 5.)

13 **B. Watson's and SSCS's History of Violent Attacks Against Plaintiffs' Vessels,  
 14 Crew, and Researchers.**

15 There can be and is no factual dispute about the violence employed by defendants  
 16 in their effort to halt whaling. Indeed, Watson flaunts it.

17 Emblazoned on the side of the M/V STEVE IRWIN are the flags of 10 vessels  
 18 Watson claims to have sunk. (Complaint, Dkt. No. 1, Ex. 2.) Likewise, Watson displays the  
 19 flags of 4 Japanese vessels he claims to have rammed. (*Id.* at Ex. 3.) The first vessel Watson  
 20 claims to have sunk in 1979 was the SIERRA, which he "hunted down, rammed, and disabled  
 21 the pirate whaling ship *Sierra*" because "for 10 years [he] watched as the International Whaling  
 22 Commission and world governments did nothing to stop a ship that was blatantly flaunting  
 23 international regulations protecting whales." (*Id.* at ¶ 13.)

24 This violence has been employed by SSCS and Watson in their campaigns against  
 25 research whaling in the Southern Ocean. The scope and extent of that violence is recounted in  
 26 the Cpt. Ogawa Decl. and the Cpt. Miura Decl. and is captured in numerous videos and

1 photographs referenced in the Ito Decl. (*See* Cpt. Ogawa Decl. ¶¶ 6-12; Cpt. Miura Decl. ¶¶ 6-9;  
 2 Ito Decl. ¶ 6.) If the Court were to view only one video to get a sense of how outrageous and  
 3 dangerous defendants' conduct is, the Court should view the February 2009 ramming of the  
 4 YUSHIN MARU NO. 3 by the M/V STEVE IRWIN. (Complaint, Dkt. No. 1, Exs. 5-6.)

5               SSCS's campaign in the Southern Ocean last season (December 2010-February  
 6 2011) against plaintiffs entitled "No Compromise" was declared by defendants to be a "great  
 7 success: We found the Japanese fleet early, we were able to block their operations and thus shut  
 8 down their whaling activities . . . a great victory indeed." (Complaint, Dkt. 1, ¶ 16.) Tactics  
 9 employed by defendants to achieve their "victory" utilized the vessels M/V BOB BARKER,  
 10 M/V STEVE IRWIN and a fast trimaran named GOJIRA, now renamed the BRIGITTE  
 11 BARDOT. (*Id.* at ¶¶ 15.4, 15.5, 17.) Those vessels and their crew, including Watson, dragged  
 12 ropes in the paths of plaintiffs' vessels in an effort to entangle the rudders and propellers and  
 13 were successful in entangling the rudder of the YUSHIN MARU NO. 3. (*Id.* at ¶ 15.4.) Those  
 14 vessels and rubber boats launched from them fired glass projectiles filled with butyric acid<sup>2</sup> at  
 15 the YUSHIN MARU NO. 3 and launched incendiary devices against the ship, many of which  
 16 landed on the vessel. (Ito Decl. ¶ 6, Exs. 77-132.)

17               Now SSCS and Watson intend to use the same ships used last season to conduct  
 18 operation "Divine Wind" this season. As posted on the SSCS website, "Sea Shepherd will return  
 19 to the remote waters for their 8th Antarctic Whale Defense Campaign with a stronger anti-  
 20 whaling fleet in early December 2011 to protect the great whales." (Complaint Dkt. No. 1, ¶ 17.)  
 21 Watson recently stated, "'They will have to kill us to prevent us from intervening once again . . . ,  
 22 and we will undertake whatever risks to our lives will be required to stop this invasion of  
 23 arrogant greed into what is an established sanctuary for the whales.'" (*Id.* at ¶ 18.) An SSCS  
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25               <sup>2</sup> The International Chemical Safety Card published by the National Institute for Occupational  
 26 Safety and Health for butyric acid states that the acid may cause skin burns, loss of vision, and  
 shortness of breath. *See* <http://www.cdc.gov/niosh/ipcsneng/neng1334.html> (last visited Dec. 12,  
 2011).

1 crew member on the M/V BOB BARKER is quoted as saying, "We intend to stop them and we  
 2 will stop them—that's a promise." (*Id.*)

3 Just before this action was filed, Watson was quoted in the press as saying, "If  
 4 they try to load whales then we will be there. If that means collusions [*sic*: collisions] between  
 5 the ships then so be it, because we're not going to move." (Neupert Decl. ¶ 2.) After learning  
 6 this action had been filed, the rhetoric continued. The SSCS website posted a quote from  
 7 Watson, calling this action "frivolous" and stating, "[w]e will not be deterred by force, by  
 8 lawsuits, by bureaucrats, by critics or by any government." (Neupert Decl. ¶ 3 & Ex. 1.)

9 Defendants recognize no boundaries on their conduct. But there are boundaries  
 10 this Court should enforce. Defendants must be stopped from violent and dangerous attacks on  
 11 plaintiffs' vessels and crew in the Southern Ocean. Defendants may protest plaintiffs' actions—  
 12 but defendants may not engage in violent or dangerous physical attacks against vessels and crew  
 13 that endanger life and property.

14 **III. PLAINTIFFS MEET THE STANDARD FOR ISSUANCE OF  
 15 A PRELIMINARY INJUNCTION**

16 A preliminary injunction may issue if the claimant demonstrates: (1) a likelihood  
 17 of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of hardship tips  
 18 in claimant's favor; and (4) that the public interest supports granting the injunction. *Winter v.*  
 19 *Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365 (2008). The Ninth Circuit follows *Winter*  
 20 with two variations.

21 First, the Ninth Circuit uses a "serious questions" approach, under which a  
 22 preliminary injunction will issue when plaintiffs demonstrate "serious questions going to the  
 23 merits and a balance of hardships that tips sharply towards the plaintiff . . . so long as the  
 24 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the  
 25 public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137-38 (9th Cir.  
 26 2011). This Court utilizes the "serious questions" approach. See *Mirina Corp. v. Marina*

1     *Biotech*, 770 F. Supp. 2d 1153, 1161 (W.D. Wash. 2011); *Riverside Publ'g Co. v. Mercer Publ'g*  
 2     *LLC*, No. C11-1249-RAJ, 2011 WL 3420421, at \*3 (W.D. Wash. Aug. 4, 2011). The "serious  
 3     questions" approach is intended to provide flexibility to the district court by allowing the "court  
 4     to grant a preliminary injunction in situations where it cannot determine with certainty that the  
 5     moving party is more likely than not to prevail on the merits of the underlying claims, but where  
 6     the costs outweigh the benefits of not granting the injunction." *Cottrell*, 632 F.3d at 1133.

7                 Second, the Ninth Circuit uses a "sliding scale" approach under which "the  
 8     elements of the preliminary injunction test are balanced, so that a stronger showing of one  
 9     element may offset a weaker showing of another." *Id.* at 1131. "For example, a stronger  
 10    showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on  
 11    the merits." *Id.* (citing *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813  
 12    (9th Cir. 2003)).

13                 Plaintiffs meet the standard for preliminary injunction under any of these  
 14    approaches. As explained more fully below, plaintiffs are likely to succeed on the merits of their  
 15    claims because defendants are not entitled to attack plaintiffs' vessels. Defendants' past and  
 16    threatened conduct violates established international and state law. Even if there could be some  
 17    doubt in this regard, plaintiffs' claims raise "serious questions," and, given the undisputed risk to  
 18    life and property, the threatened injury is substantial and irreparable. Finally, the public interest  
 19    will be served by maintaining public order—ensuring that safety at sea is preserved and that  
 20    defendants are prevented from endangering lives and property.

#### 21                          IV. ARGUMENT

##### 22                  A. Plaintiffs Will Likely Succeed on the Merits.

23                 Plaintiffs have a right of freedom of safe navigation on the high seas, of freedom  
 24    from piracy, and of freedom from terrorism. As alleged in the complaint and discussed below,  
 25    plaintiffs assert claims to injunctive relief to prevent violation of these rights. These claims arise  
 26    under international law and treaties (and thus federal statutory and common law), as well as

1 Washington state common law (assault, battery, and trespass). The violent and dangerous  
 2 attacks that defendants have vowed to continue against plaintiffs' vessels, crew, and researchers  
 3 violate international and common law—and common sense. Thus, plaintiffs likely will succeed  
 4 in asserting their rights to injunctive relief, or at the very least raise "serious questions" going to  
 5 the merits of these claims.

6       1.     Claims Under International Law and Treaties

7              The United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716,  
 8 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), held that under the Alien Tort Statute ("ATS"),  
 9 28 U.S.C. § 1330,<sup>3</sup> federal courts may recognize claims "based on the present-day law of  
 10 nations" provided that the claims rest on "norm[s] of international character accepted by the  
 11 civilized world and defined with a specificity comparable to the features of the 18th-century  
 12 paradigms . . ." *Sosa*, 542 U.S. at 725.

13              When determining "the current state of international law," the *Sosa* Court directed  
 14 federal courts to "look[] to those sources we have long, albeit cautiously, recognized." *Sosa, id.*  
 15 at 733. Those sources include treaties, which "are proper evidence of customary international  
 16 law because . . . they create *legal obligations* akin to contractual obligations on the States parties  
 17 to them." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003); *see also*  
 18 Restatement (Third) of Foreign Relations Law § 102(3) ("International agreements . . . may lead  
 19 to the creation of customary international law when such agreements are intended for adherence  
 20 by states generally and are in fact widely accepted.").

21              In *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390 & 09-56381, \_\_ F.3d \_\_,  
 22 2011 WL 5041927, at \*18-27 (9th Cir. Oct. 25, 2011), the court noted that a claim under  
 23 international law exists provided the internationally recognized norm is "'specific, universal, and  
 24 obligatory.'" *Id.* at \*2 (quoting *Sosa*, 542 U.S. at 732). Provided that the international norm

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<sup>3</sup> The ATS grants district courts "original jurisdiction of any civil action by an alien for a tort  
 only, committed in violation of the law of nations or a treaty of the United States."

1 meets this standard, the claim arises under federal common law and may be asserted under the  
 2 ATS and under 28 U.S.C. § 1331. *Id.* at \*10. The *Sarei* court went on to hold that claims by  
 3 aliens alleging genocide and war crimes allegedly committed by a foreign corporation overseas  
 4 met the *Sosa* standard because treaties to which the United States was a party defined those  
 5 offenses in a manner that was specific, obligatory and universal.<sup>4</sup> *Id.* at \*18, \*23.

6                 Here, plaintiffs bring three claims for violation of customary international law  
 7 (and treaties): freedom of safe navigation, freedom from piracy, and freedom from terrorism.  
 8 The status of each claim as a violation of customary international law is substantiated by  
 9 multiple widely-recognized and ratified treaties that define defendants' past and threatened  
 10 actions as illegal.

11                 a.         Freedom of Safe Navigation on the High Seas

12                 As might be expected, freedom of safe navigation on the high seas is an  
 13 internationally recognized and accepted norm, as demonstrated by at least four international  
 14 treaties. First, article 2 of the Convention on the High Seas, *done at Geneva Apr. 29, 1958*,  
 15 13.2 U.S.T. 2312 (1962), 450 U.N.T.S. 82 (ratified by United States on Apr. 12, 1961, and  
 16 entered into force Sept. 30, 1962) (hereinafter "High Seas Convention") provides, in part,  
 17 "Freedom of the high seas is exercised under the conditions laid down by these articles . . . . It  
 18 comprises, *inter alia*, . . . (1) [f]reedom of navigation . . . ." A total of 63 nations are parties to  
 19 the High Seas Convention. As the Second Circuit recognized, the High Seas Convention is a  
 20 "contemporary statement of the international concern and accord" regarding the "right of a  
 21 neutral ship to free passage on the high seas." *Amerada Hess Shipping Corp. v. Argentine*  
 22 *Republic*, 830 F.2d 421, 424 (2d Cir. 1987), *rev'd on other grounds*, *Argentine Republic v.*  
 23 *Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989).

24  
 25                 <sup>4</sup> One was the Convention on Prevention and Punishment of the Crime of Genocide to which  
 26 over 140 nations were parties and the other was the Fourth Geneva Convention Relative to the  
 Protection of Civilian Persons in Time of War as to which at least 180 nations were parties.  
*Sarei*, 2011 WL 5041927, at \*18-25.

1               Second, article 87 of the Convention on the Law of the Sea, *adopted by the Third*  
 2   *United Nations Conference on the Law of the Sea and opened for signature at Montego Bay,*  
 3   *Jamaica*, Dec. 10, 1982, 1833 U.N.T.S. 31363 (entered into force Nov. 16, 1994) (hereinafter  
 4   "UNCLOS"), also provides for "freedom of navigation" on the high seas. Of the 193 member  
 5   States of the United Nations, 162 are parties to UNCLOS. The United States has not ratified  
 6   UNCLOS because of its "regulations related to deep seabed exploration and mining";  
 7   nevertheless, "the United States has consistently accepted UNCLOS as customary international  
 8   law for more than 25 years." *U.S. v. Hasan*, 747 F. Supp. 2d 599, 635-36 (E.D. Va. 2010). The  
 9   Ninth Circuit also recognized that UNCLOS reflects customary international law that is specific  
 10   and obligatory. *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (citing  
 11   *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)), *rev'd on other grounds*, 542 U.S.  
 12   692 (2004).

13               Third, the Convention for the Suppression of Unlawful Acts Against the Safety of  
 14   Maritime Navigation, *concluded at Rome* Mar. 10, 1988, S. Treaty Doc. No. 101-1,  
 15   1678 U.N.T.S. 29004, 27 I.L.M. 668 (1988) (entered into force Mar. 1, 1992; ratified by the  
 16   United States on Dec. 6, 1994, and entered into force by United States on Mar. 6, 1995)  
 17   (hereinafter "SUA Convention") recognized, among other things, that "unlawful acts against the  
 18   safety of maritime navigation jeopardize the safety of persons and property, seriously affect the  
 19   operation of maritime services, and undermine the confidence of the peoples of the world in the  
 20   safety of maritime navigation." SUA Convention, 4th preamble. The SUA Convention makes it  
 21   an offense if a "person unlawfully and intentionally: . . . (b) performs an act of violence against  
 22   a person on board a ship if that act is likely to endanger the safe navigation of that ship; or  
 23   (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe  
 24   navigation of that ship . . ." SUA Convention, art. 3, § 1(b)-(c). An offense is also committed  
 25   if a person attempts to commit any of the foregoing, abets the commission of any of the  
 26   foregoing, or threatens to commit any of the foregoing if "likely to endanger the safe navigation

1 of the ship." Art. 3, § 2. Each "State Party shall take such measures as may be necessary to  
 2 establish its jurisdiction over the offences . . . when the offence is committed . . . by a national of  
 3 that State." Art. 6, § 1(c). A total of 157 nations have ratified the SUA Convention.

4                 Finally, the Convention on the International Regulations for Preventing Collisions  
 5 at Sea, *concluded at London on Oct. 20, 1972*, 28.3 U.S.T. 3459, 1050 U.N.T.S. 15824  
 6 (acceptance by United States on Nov. 23, 1976, and entered into force July 15, 1977) (hereinafter  
 7 "COLREGs"), obligates vessels such as those utilized by defendants to employ methods and  
 8 means to *avoid collisions* on the high seas (not to cause collisions). Over 150 nations have  
 9 signed COLREGs. It became a treaty of the United States on or about July 15, 1977. *See*  
 10 33 U.S.C. § 1602 (citing Ex. Ord. No. 11964, Jan. 19, 1977, 42 F.R. 4327).

11                 Defendants have flouted these internationally recognized norms by intentionally  
 12 and unlawfully interfering with plaintiffs' right to freedom of navigation. Among other things,  
 13 defendants have (1) directed vessels and their crew to drag ropes and other devices in front of  
 14 and around plaintiffs' vessels to disable or slow the vessels; (2) launched acid-containing  
 15 projectiles against plaintiffs' vessels and crew, causing injury and damage; (3) launched  
 16 incendiary devices against the vessels and crew; (4) rammed plaintiffs' vessels with their vessels;  
 17 and (5) navigated their vessels in a manner endangering plaintiffs' vessels and crew and resulting  
 18 in collisions between vessels. (*See* Cpt. Ogawa Decl. ¶¶ 6-12; Cpt. Miura Decl. ¶¶ 6-9.)

19                 Through "Operation Divine Wind," defendants have vowed to increase their  
 20 efforts to "stop" plaintiffs' activities in the Southern Ocean even if death ensues. It cannot be  
 21 doubted that defendants intend to "stop" plaintiffs by engaging in the same unlawful practices  
 22 they have utilized in the past and which violate the international norms set forth in the High Seas  
 23 Convention, UNCLOS, the SUA Convention and COLREGs.

24                 b.         Freedom from Piracy

25                 The law of nations universally condemns acts of pirates as *hostes humani*  
 26 *generis*—enemies of all mankind. *See U.S. v Shi*, 525 F.3d 709, 723 (9th Cir. 2008). Given this

1 universal condemnation, the Supreme Court recognized piracy as one of the three original  
 2 violations giving rise to a claim under the ATS. *See Sosa*, 546 U.S. at 715. Under the common  
 3 law and law of nations, as set forth in UNCLOS, the High Seas Convention, and the  
 4 SUA Convention, violent attacks on vessels on the high seas, such as the attacks committed by  
 5 defendants, are acts of piracy.

6                 The High Seas Convention and UNCLOS define piracy as (i) any "illegal acts of  
 7 violence, detention or any act of depredation, committed for private ends by the crew or the  
 8 passengers of a private ship . . . and directed . . . [o]n the high seas, against another ship . . . or  
 9 against persons or property on board such ship"; (ii) "[a]ny act of voluntary participation in the  
 10 operation of a ship . . . with knowledge of facts making it a pirate ship"; and (iii) "[a]ny act of  
 11 inciting or intentionally facilitating" any of the foregoing acts. High Seas Convention Art. 15,  
 12 §§ 1, 3; UNCLOS § 101.<sup>5</sup> "[T]he international crime of piracy is definitively reflected in both  
 13 the High Seas Convention and UNCLOS, and UNCLOS has been accepted by the overwhelming  
 14 majority of the world as reflecting customary international law." *Hasan*, 747 F. Supp. 2d at 640.  
 15 The definition of "piracy" in UNCLOS "has a norm-creating character and reflects an existing  
 16 norm of customary international law that is binding on even those nations that are not a party to  
 17 [UNCLOS], including the United States." *Id.* at 634.

18                 The SUA Convention also defines acts of piracy. It recognizes that "unlawful  
 19 acts against the safety of maritime navigation jeopardize the safety of persons and property,  
 20 seriously affect the operation of maritime services, and undermine the confidence of the peoples  
 21 of the world in the safety of maritime navigation." 4th preamble. The SUA Convention makes it  
 22 an offense if a "person unlawfully and intentionally: . . . (b) performs an act of violence against  
 23 a person on board a ship if that act is likely to endanger the safe navigation of that ship; or  
 24 (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe

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<sup>5</sup> *See Hasan*, 747 F. Supp. 2d at 620 (noting that UNCLOS "defines piracy in exactly the same  
 26 terms as the 1958 High Seas Convention, with only negligible stylistic changes").

1 navigation of that ship . . ." Art. 3, § 1(b)-(c). An offense is also committed if a person  
 2 attempts to commit any of the foregoing, abets the commission of any of the foregoing, or  
 3 threatens to commit any of the foregoing if "likely to endanger the safe navigation of the ship."  
 4 Art. 3, § 2.

5                 Given the universal nature of the crime of piracy, Congress accepted as the  
 6 definition of piracy those acts as "defined by the law of nations." 18 U.S.C. § 1651.<sup>6</sup> As one  
 7 court explained, "Congress necessarily left it to the federal courts to determine the definition of  
 8 piracy under the law of nations based on the international consensus at the time of the alleged  
 9 offense." *Hasan*, 747 F. Supp. 2d at 623. Federal courts responded by adopting the definitions  
 10 of piracy in the conventions mentioned above. *See id.* at 619-20 (recognizing as international  
 11 law the High Sea Convention's and UNCLOS's definition of piracy: "illegal acts of violence,  
 12 detention or any act of depredation, committed for private ends by the crew or the passengers of  
 13 a private ship . . . and directed . . . [o]n the high seas, against another ship . . . or against persons  
 14 or property on board such ship"). Thus, in *Hasan*, the court held that acts on the high seas of  
 15 persons in one vessel charging another vessel and shooting at it constituted acts of piracy, as did  
 16 the acts of others who maintained the vessel that launched the pirate boats. *See id.* at 641-42.

17                 Defendants impliedly concede they are pirates. The flagship of Watson and  
 18 SSCS, the M/V STEVE IRWIN, flies a pirate's flag. Watson acknowledges he is a pirate, albeit  
 19 a "good pirate." (Complaint, Dkt. No. 1, ¶ 30.) And, by definition, there are no "good pirates."

20                 Irrespective of defendants' self-characterization as pirates, their conduct is  
 21 indisputably acts of piracy. The whole point of their violent attacks against the vessels and crew  
 22 is to advance their "private ends" (a violation of the High Seas Convention and UNCLOS), and  
 23 those same acts endanger safe navigation (a violation of the SUA Convention). Defendants' past  
 24

25                 <sup>6</sup> 18 U.S.C. § 1651 provides: "Whoever, on the high seas, commits the crime of piracy as  
 26 defined by the law of nations, and is afterwards brought into or found in the United States, shall  
 be imprisoned for life."

1 and threatened actions endanger the safe navigation of plaintiffs' ships and are acts of piracy in  
 2 violation of the High Seas Convention, UNCLOS, and the SUA Convention.

3                   c.        Freedom from Terrorism

4                   The International Convention for the Suppression of the Financing of Terrorism,  
 5        *done at New York Dec. 9, 1999, T.I.A.S. No. 13075, 2178 U.N.T.S. 38349* (entered into force  
 6        Apr. 10, 2002; ratified by United States on Dec. 5, 2001, and entered into force by United States  
 7        on July 26, 2002) (hereinafter "Financing Convention") is a treaty of the United States and  
 8        reflects the law of nations. *See Almog v. Arab Bank*, 471 F. Supp. 2d, 257, 277-78 (E.D.N.Y.  
 9        2007) (plaintiffs stated a claim under ATS for defendant's alleged violation of the Financing  
 10      Convention in financing suicide bombings by terrorist organizations in Israel). The Financing  
 11      Convention has been ratified by more than 130 United Nations Member States, including the  
 12      United States (ratification instrument deposited June 26, 2002).<sup>7</sup>

13                  The Financing Convention provides that it is an offense if a person "by any  
 14        means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the  
 15        intention that they should be used or in the knowledge that they are to be used, in full or in part,  
 16        in order to carry out: (a) [a]n act which constitutes an offence within the scope of" the SUA  
 17        Convention. Art. 2, § 1(a). A person also commits an offense if that person "[p]articipates as an  
 18        accomplice" in an offense or "[o]rganizes or directs others to commit an offence." Art. 2,  
 19        § 5(a), (b). Additionally, it is an offense if a person "by any means, directly or indirectly,  
 20        unlawfully and wilfully, provides or collects funds with the intention that they should be used or  
 21        in the knowledge that they are to be used, in full or in part, in order to carry out: . . . (b) [a]ny  
 22        other act intended to cause death or serious bodily injury to a civilian . . . when the purpose of  
 23  
 24

25        <sup>7</sup> The United States made criminal those acts prohibited by the Financing Convention through the  
 26        Suppression of the Financing of Terrorism Convention Implementation Act of 2002. *See*  
       18 U.S.C. § 2339C.

1 such act, by its nature or context, is . . . to compel a government . . . to do or to abstain from  
 2 doing any act." Art. 2, § 1(b).

3 Defendants' collection and use of SSCS funds to finance violent attacks under  
 4 "Operation Divine Wind" is a violation of the Funding Convention (and 18 U.S.C. § 2339C) in  
 5 two separate respects. First, Watson and SSCS collect and provide funds to carry out attacks that  
 6 are in contravention of the SUA Convention. Secondly, they collect and provide funds knowing  
 7 and intending that the funds will be used to carry out attacks against plaintiffs that are intended  
 8 to cause at least serious bodily injury to crew members and researchers (civilians) and thereby  
 9 compel the government of Japan to cease its authorization of research whaling.

10 Plaintiffs do not presently seek preliminary injunctive relief under this aspect of  
 11 their complaint. Relief under this claim is presently focused on the freezing of assets of SSCS  
 12 that might be used to fund violent attacks. Assuming the violent attacks are enjoined (and the  
 13 injunction obeyed), there should be no need to freeze funds on a preliminary injunction basis.

14       2. State-Law Claims

15 This Court also has jurisdiction over plaintiff's state-law tort claims for conspiracy  
 16 and aiding and abetting the commission of torts. Tort causes of action are "transitory in nature"  
 17 and therefore may be maintained in any court that has personal jurisdiction over the defendant.  
 18 *Mendoza v. Neudorfer Eng'rs, Inc.*, 145 Wn. App. 146, 156, 185 P.3d 1204 (2008); *see also*  
 19 *Lansverk v. Studebaker-Packard Corp.*, 54 Wn.2d 124, 125, 338 P.2d 747 (1959), *overruled on*  
 20 *other grounds*, *Werner v. Werner*, 84 Wn.2d 360, 526 P.2d 370 (1974) ("This is a transitory tort  
 21 action, and the defendant is subject to suit in any state where it can be served with process . . .").  
 22 As residents of Washington, defendants are subject to personal jurisdiction in all Washington  
 23 courts. *See SCM v. Protek*, 136 Wn. App. 569, 574, 150 P.3d 141 (2007) ("A state exercises  
 24 personal jurisdiction in the following ways: consent, domicile, residence, presence, appearance  
 25 in an action, and/or doing business in a state."). Therefore, this Court has jurisdiction over  
 26 plaintiffs' state-law claims.

1           Defendants are liable for civil conspiracy if "(1) two or more people combined to  
 2 accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful  
 3 means; and (2) the conspirators entered into an agreement to accomplish the conspiracy."  
 4 *All Star Gas, Inc., of Wash. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000) (citing  
 5 *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996), cert. denied, 522 U.S. 949,  
 6 118 S. Ct. 368, 139 L. Ed. 2d 286 (1997)). Defendants have conspired to violate numerous  
 7 sources of international law as described above, as well as the common law of assault, battery,  
 8 and trespass.<sup>8</sup> Defendants' fundraising, planning, and organizing for Operation Divine Wind is  
 9 nothing more than a conspiracy to commit assaults, batteries, and trespasses against plaintiffs'  
 10 vessels, crew members, and researchers. Therefore, plaintiffs are likely to succeed on their  
 11 claims under state law.

12       **B. Plaintiffs Will Be Irreparably Harmed.**

13           It cannot reasonably be disputed that plaintiffs will suffer irreparable injury if  
 14 defendants are not enjoined from dangerous and violent acts that threaten the safety of the  
 15 plaintiffs' vessels and the crew and researchers on board. In the context of protest activities,  
 16 courts find irreparable harm when a defendant's actions threaten the health and safety of those  
 17 against whom the defendant is protesting. For example, in *Lac du Flambeau v. Stop Treaty  
 Abuse-Wisconsin*, the plaintiffs, members of the Chippewa Indian tribe with treaty rights to spear  
 19 walleye, sought to enjoin the defendants' violent interference with plaintiffs' spearing.  
 20 759 F. Supp. 1339 (W.D. Wis. 1991). Defendants "endangered the lives of speakers by  
 21 intentionally creating wakes to make it more difficult for speakers to fish . . . and . . . create the  
 22 risk that the speaker will fall from the boat into the recently thawed water." *Id.* at 1344. The  
 23

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24       <sup>8</sup> An assault is any act that causes a person apprehension that harmful or offensive contact is  
 25 imminent, and a battery is the intentional infliction of harmful or offensive contact with a person.  
*McKinney v. Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000). Trespass to personal  
 26 property is the act of causing harm to a thing in which the possessor has a legally protected  
 interest. Restatement (Second) of Torts § 218(d).

1 court held that plaintiffs faced "irreparable harm from the continu[ed] nature of the private  
 2 defendants' illegal activities . . . [and that] plaintiffs [would] continue to suffer from the improper  
 3 actions of the private defendants absent injunctive relief." *Id.* at 1353.

4           This type of irreparable harm to health and safety also is commonly considered in  
 5 the context of anti-abortion protests. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S.  
 6 753, 759, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) (upholding a permanent injunction barring  
 7 anti-abortion protestors from protesting in such a manner that risked "the health, safety and  
 8 rights" of the women going to the clinics.); *Portland Fem. Women's Health Ctr. v. Advocates for*  
 9 *Life*, 859 F.2d 681, 686 (9th Cir. 1988) (upholding an injunction where the enjoined behavior  
 10 was "endanger[ing] the health and safety of" the patients at the hospital); *Roe v. Operation*  
 11 *Rescue*, 919 F.2d 857, 862 (3d Cir. 1990) (upholding a temporary restraining order aimed at  
 12 protecting women visiting an abortion clinic from "physical and emotional harm.").

13           In *Advocates for Life*, for example, defendants were a nonprofit corporation and  
 14 others engaged in right-to-life advocacy. 859 F.2d at 683. They gathered at abortion clinics and  
 15 engaged in demonstrations that included bumping, grabbing, and pushing the plaintiff's clients to  
 16 impede the clients' passage into the clinic. *Id.* In its preliminary injunction order, the district  
 17 court recognized that the defendants' actions "are likely to continue in the future in a similar  
 18 manner in which they have taken place in the past" and that the "conduct raises the risk of  
 19 medical complications and injury to clients." *Id.* The Ninth Circuit agreed, and, recognizing the  
 20 "irreparable harm" that could result from defendants' continued endangerment of "the health and  
 21 safety of [the plaintiff's] patients[,]" upheld the preliminary injunction. *Id.* at 686.

22           Unless enjoined, defendants will very soon engage in attacks far more egregious  
 23 than those in *Lac du Flambeau* and *Advocates for Life*. Defendants' attacks will endanger the  
 24 safety of the Masters, their crew and researchers, and the vessels owned by Kyodo Senpaku and  
 25 chartered by ICR. Navigating in the Southern Ocean is dangerous given the cold waters,  
 26 presence of icebergs, possibility of storms, and its isolated location far from ready third-party

1 assistance. (See Cpt. Ogawa Decl. ¶ 13; Cpt. Miura Decl. ¶ 10.) If a ship lost propulsion or  
 2 steerage due to a successful fouling rope attack, the ship, its Master, crew and researchers could  
 3 be put in serious jeopardy, especially in the vicinity of floating ice or if a storm or heavy seas  
 4 occurred. (*Id.*)

5 Defendants' use of acid-filled glass projectiles launched against plaintiffs' vessels  
 6 and crew runs the risk of injury, including the risk of blinding a crew member. (See Cpt. Ogawa  
 7 Decl. ¶ 14; Cpt. Miura Decl. ¶ 11.) Defendants' use of incendiary devices like those launched in  
 8 the past could cause a fire or, even worse, an explosion. (See Cpt. Ogawa Decl. ¶ 15; Cpt. Miura  
 9 Decl. ¶ 12.) Close-quarter attacks by SSCS vessels or rubber boats launched from SSCS vessels  
 10 run the risk of a collision with plaintiffs' vessels. (See Cpt. Ogawa Decl. ¶ 16; Cpt. Miura Decl.  
 11 ¶ 13.) Defendants' ramming of plaintiffs' vessels could cause them to sink or suffer other serious  
 12 damage. (*Id.*)

13 There is little doubt that plaintiffs face irreparable harm if defendants are not  
 14 enjoined.

15 **C. The Balance of Hardship Tips Decidedly in Plaintiffs' Favor.**

16 There is also little doubt that the balance of hardship tips decidedly in plaintiffs'  
 17 favor. After all, defendants will suffer no hardship if enjoined—they remain free to protest but  
 18 will be enjoined from protesting in a violent and dangerous manner.

19 When protest activities are balanced against threats to physical safety, safety  
 20 prevails, especially when the protest activities involve illegal conduct. In *Lac du Flambeau*, the  
 21 defendants argued that the balance of hardships tipped in *their* favor because the injunction  
 22 would "restrict[] actions" that "infringe on their right of free speech guaranteed by the First  
 23 Amendment." 759 F. Supp. at 1353. The court disagreed, explaining that "the First Amendment  
 24 does not provide [the defendants] with a right to threaten, assault or commit battery on  
 25 plaintiffs[,] and therefore the "balance of potential harm to the parties weigh in favor of issuing  
 26 the injunction." *Id.*

1                 Similarly, in *Planned Parenthood v. Am. Coal. of Life Activists*, when considering  
 2 a motion for preliminary injunction against anti-abortion protestors, the court held:

3                 I find that the balance of hardships weighs overwhelmingly in plaintiffs' favor. In  
 4 the absence of an injunction, plaintiffs will continue to live as they did before the  
 5 trial: clad in bulletproof vests and disguises, borrowing cars and varying routes to  
 6 avoid detection, and constantly in fear of the bodily harm with which they have  
 7 been threatened.

8                 By contrast, the prohibition of unlawful activities imposes no burden on  
 9 defendants. Defendants may protest abortion using legitimate, lawful means.  
 10

11                 41 F. Supp. 2d 1130, 1154 (D. Or. 1999), *aff'd in part, rev'd in part on other grounds*, 290 F.3d  
 12 1058 (9th Cir. 2002); *see also Northeast Women's Ctr. v. McMonagle*, 745 F. Supp. 1082, 1088  
 13 (E.D. Pa. 1990) (finding the balance of hardships tips in favor of plaintiffs because protestors "do  
 14 not possess an unrestricted right to convey their beliefs in any way they desire, regardless of the  
 15 unlawful consequences and impact their actions have on others."); *U.S. v. White*, 893 F. Supp.  
 16 1423, 1438 (C.D. Cal. 1995) (holding that the balance of hardships tips in physician's favor  
 17 because of the importance in "ensuring the basic safety and freedom of movement of [the  
 18 physician and his wife]").

19                 Similarly, here the balance of hardships tips strongly in favor of plaintiffs, who  
 20 are threatened with harm to their safety and property. On the other hand, the only "injury" the  
 21 defendants could suffer would be "the prohibition of unlawful activities" during their protests.  
 22 *See Planned Parenthood*, 41 F. Supp. 2d at 1154; *see also Wilson v. CHAMPUS*, 866 F. Supp.  
 23 903, 906 (E.D. Va. 1994) (holding that "Defendant cannot seriously argue against this Court's  
 24 finding that the balance of harms analysis strongly favors the Plaintiff" when "the Plaintiff may  
 25 lose her life."). Because plaintiffs' interest in freedom from dangerous and violent attacks on the  
 26 high seas outweighs defendants' interests in illegal protests, the balance of hardships tips in favor  
 27 of plaintiffs.

1     **D.     The Public Interest Would Be Served by Issuance of an Injunction.**

2                 While "public interest" is a factor to be considered by the Court, "[w]hen the  
 3     reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the  
 4     public interest will be 'at most a neutral factor in the analysis . . .'" *Stormans, Inc. v. Selecky*,  
 5     586 F.3d 1109, 1138-39 (9th Cir. 2009) (quoting *Bernhardt v. L.A. County*, 339 F.3d 920, 931  
 6     (9th Cir. 2003)). Because the injunction here is narrow in scope and affects only the parties and  
 7     no other persons, the public interest is a neutral factor in the Court's preliminary injunction  
 8     analysis.

9                 But even if the public interest were to be considered, the public interest is served  
 10    by ensuring that protests include only lawful and safe conduct. *See Lac de Flambeau*,  
 11    759 F. Supp. at 1354 (holding that the injunction against violent protestors would "promote" the  
 12    public interest because the "public has a strong interest in protecting the rights of all persons  
 13    from unlawful interference from others."). This common-sense recognition that plaintiffs are to  
 14    be free from violent and dangerous attacks in the Southern Ocean is recognized by the  
 15    International Whaling Commission. By consensus, the International Whaling Commission  
 16    adopted a resolution in July 2011 that states in part that it "**AGREES** that the resolution of  
 17    differences on issues regarding whales and whaling should not be pursued through violent  
 18    actions that risk human life and property at sea." (Neupert Decl. ¶ 4 & Ex. 2.)

19                 This, combined with the universally accepted interest in ensuring safe navigation  
 20    and freedom from piracy, demonstrates that the public interest is well served by enjoining  
 21    defendants' actions. An injunction would require defendants' compliance with international and  
 22    domestic law that protects the safety and lives of both plaintiffs and defendants in the Southern  
 23    Ocean.

24  
 25  
 26

## V. CONCLUSION

2 For the foregoing reasons, plaintiffs respectfully ask this Court to grant plaintiffs'  
3 motion for preliminary injunction.

DATED this 14th day of December, 2011.

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1 I hereby certify that on December 14, 2011, I electronically filed the foregoing  
2 Plaintiffs' Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF  
3 system, which will send notification of such filing to the following:

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11 and I hereby certify that I have mailed by United States Postal Service the document to the  
12 following non-CM/ECF participants:

13 Not applicable  
14

15 DATED this 14th day of December, 2011.  
16

17 By: s/ John F. Neupert  
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